Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

No. 02-512

IN THE

Supreme Court of the United States

UNITED HOSPITAL CENTER, *et al.*,
Petitioners,

v.

DANIEL GUIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WRAY V. VOEGELIN, ESQ.
Counsel of Record
DONALD J. TENNANT, JR., ESQ.
CASSIDY, MYERS, COGAN,
VOEGELIN & TENNANT, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
(304) 232-8100

(For Additional Counsel See Inside Cover)

Wright Appellate Services 1012
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

PAUL R.CRANSTON, ESQ.
CRANSTON & EDWARDS, P.L.L.C.
Dorsey Avenue Professional Building
1200 Dorsey Avenue, Suite II
Morgantown, WV 26505
(304) 296-3500

JACQUES R. WILLIAMS, ESQ.
HAMSTEAD, HAMSTEAD & WILLIAMS
231 Walnut Street
Morgantown, WV 26505
(304) 296-3636

DAVID J. SIMS, ESQ.
ROBERT G. MCCOID, ESQ.
SIMS & MCCOID
1201 Main Street
Wheeling, WV 26003
(304) 242-2000

Attorneys for Respondent,
David Guida

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Factual Background 1

A. The West Virginia Statues at Issue 1
B. The Defendants are Overcharging for Medical Records 2
C. The Amended Complaint 4
D. Claims Asserted 5

Procedural Backdrop 7

The Order Certifying Class 10

Discussion 13

A. Jurisdiction 13
B. The Constraints of Article III Do Not Apply to State Courts 14
C. The Class Procedural Device is Appropriate in this Action 20
D. Typicality/Class Standing 21

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct.2231, 138 L.Ed.2d 689 (1997) 19

ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989)..... 15, 17

Blue Creek Development Co. v. Howell, 101 W.Va. 748, 133 S.E.2d 699 (1926) 6

Cooper v. Oklahoma, 517 U.S. 348 (1996) 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-80 (1975)..... 13

Cruz v. All Saints Healthcare Systems, Inc., 242 Wis.2d 432, 624 N.W.2d 344 (Wis.Ct.App. 2001)..... 20

Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429 (1952)..... 15

Eastern Associated Coal Corp., v. Doe, 159 W.Va. 200, 220 S.E.2d 672 (1975) 18

Eisen v. Carlisle and Jacqueline, 417 U.S. 156 (1974)..... 25

Evans v. Huntingdon Publishing Co., 283 S.E.2d 854 855 (W.Va. 1981) 20

In re: Auction Houses Antitrust Litigation, 193 F.R.D. 162 (D.C. N.Y. 2000) 25

In re: Industrial Diamonds Antitrust Litigation, 167 FRD 374 (S.N.D.Y. 1996) 25

LaMar v. H&B Novelty and Loan Co., 489 F.2d 461 (9th Cir. 1973) 22, 23, 24, 26

Los Angeles v. Lyons, 461 U.S. 95 (1983) 15

Malinski v. New York, 65 S.Ct. 781 (1945) 14

Ortiz v. Fibre Board Corp., 537 U.S. 815 (1999) 19

Payton v. County of Kane, 00-3789 (7th Cir. 2002) 15

Pennell v. San Jose, 485 U.S. 1, 8 (1988) 15, 17

Shanks v. Wilson, 86 F.Supp. 789 (S.D. W.Va. 1949) 6

Snyder v. Callaghan, 168 W.Va. 265, 284 S.E.2d 241 (1981) 18

State ex rel. Alsop v. McCartney, 159 W.Va. 829, 838 228 S.E.2d 278, 283 (1976) 18

State ex rel. Erie Fire Ins. v. Madden, 204 W.Va. 606, 515 S.E.2d 351 (1998) ..... *passim*

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1081-82 (Ohio 1999) 16

U.S. Dept. of Labor v. Triplett, footnote, 494 U.S. 715, 721 (1994)(emphasis added) 15

Weld v. Glaxo Welcome, Inc., 746 N.E.2d 522, 529 (Mass. 2001) 16

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 14

Rules:

W.Va. Code, 16-29-1 ..... *passim*

W.Va. Code, 16-29-1(e) 5

W.Va. Code, 16-29-2 ..... *passim*

W.Va. Code, 47-18-1, et seq. 6

W.Va. Code, 46A-6-104 6

Statutes:

28 U.S.C. § 1257(a) 13

W.V.R.Civ. P. 23 (a) and (b) 12

W.V.R.Civ. P. 23 (a)(3) 21, 28

W.V.R.Civ. P. 23(a)(1)-(4) 20

W.V.R.Civ. P. 12(b)(1)(3) and (6) 8

W.V.R.Civ.P. 12(b)(3)..... 7
W.V.R.Civ.P. 12(b)(6)..... 7
W.V.R.Civ.P. 23..... 14, 19, 20, 21
W.V.R.Civ.P. 23(b)(1)(A) and (B)..... 9, 10
W.V.R.Civ.P. 23(c)(4)..... 11
W.V.R.Civ.P. 23(c)(4)(B) 10, 12

STATEMENT OF CASE

This Brief in Opposition to the Petition For Writ of Certiorari filed in this matter is submitted on behalf of the respondent, Daniel Guida, individually and as the representative of the class of all similarly situated individuals. The following factual backdrop and procedural history include additional facts or clarifications of the statements contained in the petition for writ of certiorari.

I. FACTUAL BACKDROP

A. The West Virginia Statutes at Issue

Pursuant to the provisions of *W.Va. Code*, 16-29-1, upon written request of a patient, his authorized agent or authorized representative, health care providers in West Virginia are required to furnish a copy of the patient's requested records. Under *W.Va. Code*, 16-29-2, West Virginia health care providers are entitled to be "reimbursed" by the person requesting a copy of a patient's records, at the time of delivery, "for reasonable expenses incurred" in complying with the statute's requirement that copies of health care records be furnished to patients or their authorized representatives. *W.Va. Code*, 16-29-2 further provides that the "reimbursement" for "reasonable expenses incurred in complying with this article...may not exceed 75¢ per page for the copying of any record or records...and a search fee may not exceed $10.00."

B. The Defendants are Overcharging for Medical Records

The term "reimburse" means: "to pay back, to make restoration, to repay that expended; to indemnify, or make whole." Black's Law Dictionary 5th Ed. at P. 1557. Other authorities define "reimburse" as: "1. [t]o pay back; to repay. 2. [t]o make restitution of an equivalent to (a person); indemnify." Webster's New Collegiate Dictionary. And "to repay or make up to one (a sum expended)." The Oxford English Dictionary. Thus, "reimbursement" is the act of reimbursing or paying somebody back money spent for an approved reason. In applying this term to *W.Va. Code*, 16-29-2 it becomes clear that health care providers in West Virginia are entitled to be "paid back" for reasonable expenses incurred in complying with a request by a patient or his authorized representative for a copy of a patient's medical records, with the proviso that the cost charged to the requestor for such reimbursement may not exceed 75¢ per page and a $10 search fee.

Despite the clear statutory language which limits a health care provider's right to charge patients or their authorized representatives only an amount sufficient to be "reimbursed" or "paid back" for reasonable expenses incurred in complying with a request for medical records, the defendant health care providers in the action below, including petitioners herein, and their copy company agents have routinely engaged in the practice of charging the statutory maximum even though this maximum rate far exceeds the amount necessary to "reimburse" or "pay back" the hospitals for reasonable expenses incurred in complying with such requests for medical records.

The representative plaintiff's responses to discovery confirm that he has requested medical records in his capacity as an authorized representative of patients of the defendant, Weirton Medical Center, pursuant to the provisions of *W.Va. Code*, 16-29-1; and in order to obtain the requested medical records, he was charged 75¢ per page and a $10 search fee. This is the same cost that the great majority of statutory medical record requestors are charged for medical records throughout West Virginia.

Although *W.Va. Code,* 16-29-2 clearly limits the amount which health care providers in West Virginia are allowed to charge for medical records requested by a patient or his authorized representative to a sum necessary for such health care provider to be "reimbursed" or "paid back" for reasonable expenses incurred in complying with such requests for medical records, discovery adduced in this action to date has made it apparent that the defendant health care providers, acting in combination with their copy company agents and otherwise, are charging statutory medical record requestors amounts significantly in excess of what is necessary for reimbursement. Indeed, the contracts between the defendant health care providers and the defendant copy companies which have been produced in this matter clearly demonstrate that hospitals throughout West Virginia have chosen to enter into "sweetheart" deals with copy companies whereby they allow the copy companies to charge statutory medical record requestors the maximum rate in return for the copy companies' agreement to kick-back a portion of the statutory "search fee" while also providing no cost or low cost copies to the hospitals.

The representative plaintiff contends that the burden of paying for "free" copies that the hospitals give to other health care providers and certain insurance companies, and "courtesy copies" that are given to the hospital for its administrative needs, should not be borne by statutory medical requestors; and that forcing the statutory requestors to subsidize these sweetheart deals is in direct contravention of the provisions of *W.Va. Code, 16-29-2.*

This Court should not be misled by the hospitals' utilization of Webster Memorial Hospital as an "illustrative" petitioner. Webster Memorial's billing practices are not representative of the other hospitals which have been named as defendants in this case. Based on the discovery provided to date, it appears that Webster Memorial is the only defendant which charges 75¢ per page while not charging statutory medical record requestors an additional $10 search fee. Webster Memorial's charge of only 75¢ per page without a search fee is truly unique and begs the question of how it is able to do this when the other hospitals and copy companies require a $10 search fee under the same "reimbursement" statute.

C. The Amended Complaint

The representative plaintiff in this case has alleged that he is a patient, an authorized agent of a patient, or an authorized representative of a patient who has received medical care from a licensed, certified, or registered health care provider in West Virginia. He has alleged that he has properly requested medical records from the defendant, Weirton Medical Center, pursuant to the provisions of *W.Va. Code*, 16-29-1. He has further alleged that in response to his request for

medical records he was charged 75¢ per page for copying said medical records along with a search fee in the amount of $10. These facts are not in dispute.

The representative plaintiff contends Weirton Medical Center and the other defendant hospitals maintain a practice of charging patients, their authorized agents or authorized representatives who request copies of medical records under *W.Va. Code*, 16-29-1 an amount which exceeds the allowable cost under *W.Va. Code*, 16-29-2 because the charges are more than the amount necessary to "reimburse" or "pay back" the defendant hospitals for "reasonable expenses incurred in complying" with Article 29 of West Virginia's Health Care Records statutes.

The representative plaintiff has also named as defendants certain "copy companies." It is alleged that the defendant copy companies have been engaged by certain of the defendant hospitals for purposes of furnishing medical records to patients or their representatives who have requested the same pursuant to the provisions of *W.Va. Code*, 16-29-1, and that said defendant copy companies charge the patients, their authorized agents or authorized representatives amounts which exceed the amount necessary for "reimbursement" of reasonable expenses incurred in connection with furnishing medical records.

D. Claims Asserted

Count I of the amended complaint states a cause of action for violation of *W.Va. Code*, 16-29-2. This cause of action relates to the defendants' overcharging for medical records. It is expressly authorized by *W.Va. Code*, 16-29-1(e), which

states that the provisions of Chapter 16, Article 29 of the West Virginia Code may be enforced by a patient, his authorized agent, or authorized representative.

Count II of the amended complaint sets forth a cause of action for civil conspiracy and restraint of trade This cause of action is based upon the allegation that the defendant hospitals have acted in combination and concert with each other and/or with certain of the defendant copy companies in violation of the provisions of *W.Va. Code*, 16-29-2 such as to constitute a civil conspiracy and/or an unlawful restraint of trade violative of the West Virginia Antitrust Act (*W.Va. Code*, 47-18-1, et seq.).

Count III of the amended complaint sets forth a cause of action for violation of West Virginia's Consumer Credit and Protection Act. Pursuant to the provisions of *W.Va. Code*, 46A-6-104, unfair methods of competition and unfair or deceptive acts or practices in the conduct of commerce are unlawful.

Count IV of the amended complaint states a cause of action for unjust enrichment. The principle of "unjust enrichment" applies when one person has in his possession money which has come into his hands under circumstances which make it unjust for him to retain it and which, in equity and good conscience, belongs to some other person. *Shanks v. Wilson*, 86 F.Supp. 789 (S.D. W.Va. 1949). Plaintiff's remedy for unjust enrichment arises by implication and rests upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of others. *Blue Creek Development Co. v. Howell*, 101 W.Va. 748, 133 S.E.2d 699 (1926).

Finally, Count V of the amended complaint states a cause of action for punitive damages. This claim is premised upon the defendants' overcharging for medical records which is alleged to have been committed intentionally and in willful, wanton and reckless disregard of the rights of plaintiff and the class of all similarly situated individuals.

This Court will note that all of the claims asserted in the amended complaint arise under West Virginia law and that there is no question of federal law presented in this action.

II. PROCEDURAL BACKDROP

On March 2, 2001, the representative plaintiff filed his initial complaint in this action. Upon hearing the defendants' joint motion for an extension of time in which to answer or otherwise plead to said complaint and joint motion for a protective order staying discovery, the circuit court extended the time within which the defendants could file responsive pleadings and respond to outstanding discovery requests to May 15, 2001.

Thereafter, the defendants filed motions to dismiss under *W.V.R.Civ.P.* 12(b)(6) and, as well, certain defendants filed motions to dismiss premised upon *W.V.R.Civ.P.* 12(b)(3).

On July 6, 2001, a hearing was conducted upon the defendants' motions to dismiss and such motions were denied (*See* Petition at App. D). The circuit court further ordered the defendants to file responses to plaintiff's second set of discovery on or before August 6, 2001, with the understanding that the defendants need only supply information for the five years next preceding the institution of suit (i.e. March 1996). The circuit court deferred ruling upon the defendants' objec-

tions based on patient confidentiality and ordered that until such time as the confidentiality issue was heard and ruled upon, the defendants need not respond to any discovery requests requiring them to divulge the identity of any patient who requested medical records or any patient's medical record. The defendants were, however, required to respond to certain specified discovery requests.

On August 24, 2001, the parties convened for a hearing which was limited to discovery concerns related to the defendant copy companies and such copy companies were ordered to provide certain information with regard to copy services performed for hospitals within the geographic boundaries of West Virginia from 1996 forward.

By agreed order entered on September 27, 2001, the representative plaintiff was granted leave to file an amended complaint, and the same was thereafter properly lodged with the circuit clerk.

On December 28, 2001, the parties appeared for a status conference and an agenda was established for answers to the amended complaint to be filed and dates were set for hearings upon discovery disputes, the newly added defendants' motions to dismiss, and the certification question. The defendants filed a motion to dismiss the amended complaint pursuant to *W.V.R.Civ.P.* 12(b)(1)(3), and (6). On February 25, 2002, after reviewing exhaustive briefing by all sides, the circuit court heard argument upon the motions to dismiss. For reasons consistent with the earlier ruling upon the initial motions to dismiss, the circuit court denied the motions to dismiss (*See* Petition at App. C).

On May 6, 2002, the circuit court conducted a hearing upon plaintiff's motion to maintain the action below on behalf of a class and by order entered on May 22, 2002, the circuit court determined that the action should be maintained as a class under *W.V.R.Civ.P.* 23(b)(1)(A)and(B). Because the defendants expressed their intention to file a petition for writ of prohibition before the Supreme Court of Appeals of West Virginia, the circuit court stayed the action so as to provide the defendants with an opportunity to present a petition to the West Virginia high court.

On June 12, 2002, the defendants filed an original proceeding seeking a Writ of Prohibition against the chief judge of the First Judicial Circuit Court and Daniel J. Guida, individually, and as the representative of the class of all similarly situated individuals. Upon consideration of extensive briefing submitted by all parties, the Supreme Court of Appeals of West Virginia refused the petition on July 2, 2002.

On September 20, 2002, Wheeling Hospital and certain other defendant health care providers filed a motion for decertification in the circuit court. Such motion has been fully briefed and is currently pending in the state court proceeding below.

Further, the parties have agreed to the entry of a case management order in this matter which provides that all parties may continue to conduct discovery through June 9, 2003, allows any party to file dispositive motions on or before June 30, 2003, and establishes a trial date of August 4, 2003.

III. THE ORDER CERTIFYING CLASS

The Order Certifying Class entered in the state court proceedings provides for this action to be maintained as a class action under *W.V.R.Civ.P.* 23(b)(1)(A) and (B) on behalf of the following class of plaintiffs:

> All patients, authorized agents of patients, and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provision of *W.Va. Code*, 16-29-1, since March 2, 1996 and, in response to said requests, were assessed charges by any defendant health care provider or any defendant copy company.

Further, pursuant to the provisions of *W.V.R.Civ.P.* 23(c)(4)(B) the circuit court ordered the foregoing class to be divided into the following subclasses which would each be treated as a class:

Subclass A:

> All patients, authorized agents of patients and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provisions of *W.Va. Code*, 16-29-1 since March 2, 1996, and in response to said requests, have been assessed charges by any copy company named as a defendant in this action.

Subclass B:

> All patients, authorized agents of patients, and authorized representatives of patients of any health care provider in West Virginia who have made requests of such health care provider for medical records pursuant to the provisions of *W.Va. Code*, 16-29-1 since March 2, 1996 and, in response to said requests, have been assessed charges by any health care provider named as a defendant in this action.

The primary class certified in this matter is comprised of all statutory medical record requestors who were assessed charges by any defendant health care provider or any copy company since March 2, 1996. While this class definition is not an overbroad or otherwise inappropriate outline of class boundaries, under *W.V.R.Civ.P.* 23(c)(4) subclass creation is well recognized as an appropriate method to aid in the efficient and manageable adjudication of class action suits. (*See* Newberg on Class Actions, 3rd Edition at §8.12).

During the certification proceedings in this matter, it became apparent that some defendant health care providers utilized the defendant copy companies as intermediaries in charging statutory medical record requestors for medical records while other defendant health care providers charged statutory medical record requestors directly. Although the members of both Subclass A and Subclass B challenge the same conduct (i.e., charging for medical records in amounts which exceed the charges allowable under *W.Va. Code*, 16-

29-2), the members of Subclass A were actually charged by copy company defendants in their capacity as agents for the defendant health care providers, while members of Subclass B were directly charged for medical records by the defendant health care providers.

The claims of the members of Subclass A are entirely consistent with the claims of the members of Subclass B. However, the claims of Subclass A members require the establishment of additional elements pertaining to the agency relationship between the defendant health care providers and the defendant copy companies. The Subclass A members must show that the defendant copy companies were acting on behalf of the defendant health care providers when they engaged in the challenged conduct, while the Subclass B members need only establish that the health care providers with whom they dealt charged them amounts in excess of the allowable charges provided for under *W.Va. Code*, 16-29-2.

As a method of assuring that the presentation and adjudication of differing claims can be efficiently administered, *W.V.R.Civ.P.* 23(c)(4)(B) provides courts with authority to split a class into subclasses so long as each subclass satisfies the prerequisites of *W.V.R.Civ.P.* 23(a) and (b). (*See* Manual For Complex Litigation, 3rd Edition at 30.15). Hence, in cases where the provisions of *W.V.R.Civ.P.* 23(a) and (b) may be satisfied with respect to each subclass, the use of subclasses to aid in the efficient and manageable adjudication of this action constitutes an appropriate exercise of the state court's discretion under *W.V.R.Civ.P.* 23(c)(4)(B).

IV. DISCUSSION

A. Jurisdiction

While the petitioners make the conclusory statement that the July 2, 2002, order entered by the Supreme Court of Appeals of West Virginia constitutes a "final judgment" such as to provide this Court with jurisdiction pursuant to 28 U.S.C. §1257(a), the West Virginia high court's denial of the petition for writ of prohibition in this matter cannot, in any real sense, be construed to be a final judgment. In fact, as noted above, discovery is still continuing in this action and no "judgment" of any kind or character has been entered against the petitioners. If, and when, a judgment is entered against the defendants in the state court proceeding, they will have an opportunity to file an appeal with the Supreme Court of Appeals in West Virginia. It is only after the West Virginia high court affirms or denies the validity of such judgment that the issues presented by this appeal can truly be said to have been finally disposed of by the state supreme court.

The petitioners imply that the state supreme court, by denying the petition for writ of prohibition below, may have brought this case within the exceptions to the finality requirement set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975). Presumably, this is on the basis that: (1) the federal issue is conclusive, and the outcome of further proceedings is preordained; or (2) the federal questions that could come to this Court have been adjudicated by the state courts and the remaining issues will not give rise to any further federal question. However, whether these exceptions to the finality requirement even apply to this case is less than apparent. The outcome of this case is far from cer-

tain and the Supreme Court of Appeals of West Virginia did not address any federal issue in its ruling.

The state court proceedings below deal exclusively with matters of state law. The statutes which form the basis of the representative plaintiff's claims relate solely to West Virginia health care providers, and the propriety of allowing the action to proceed as a class was decided under the applicable provisions of *W.V.R.Civ.P.* 23 and interpretive West Virginia case law. Hence, because the state court rulings below were based on adequate and independent state grounds, this Court should not undertake review of the federal issue presented by petitioners herein.

B. The Constraints of Article III Do Not Apply to State Courts

The petitioners' reliance on certain due process decisions as the model for "fair play and substantial justice" is an artful – but ultimately irrelevant – segue to their Article III argument. What is at issue in this case is not remotely comparable to the due process concerns of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) in the context of long-arm jurisdiction, or in the context of an accused's competence to stand trial as in *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Federal courts have historically scrutinized state court action in criminal cases where violation of federal constitutional principles have been asserted. *See* e.g., *Malinski v. New York*, 65 S.Ct. 781 (1945). Concerns of long-arm jurisdiction obviously bear on important issues of federalism. Here, however, there simply exists no reasonable correlation between jurisdictional principles of "minimum contact" by a non-resident defendant, and the supposed duty of "minimum

contact" between a plaintiff class representative and a collection of resident defendants. Indeed, for the reason discussed by the court recently in *Payton v. Cty. of Kane*, 00-3789 (7th Cir. 2002), Article III would not necessarily accomplish the petitioners' objective even if this was a federal case. In any event, as will be discussed below, Article III has no applicability to this state court proceeding.

The doctrine of standing is derived from the "case or controversy" requirement of Article III. The federal standing doctrine limits the reach of Article III courts by imposing strict entry requirements on litigants seeking redress in federal courts. This Court, however, has made it clear that the constraints of Article III do not apply to state courts. Consequently, state courts are not bound by the limitation of Article III "case or controversy" or other federal rules relating to justiciability. *See*, e.g., *Pennell v. San Jose*, 485 U.S. 1, 8 (1988); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429 (1952).

The recognition by this Court of the inapplicability of Article III's standing requirements to state courts extends even to state courts' interpretation of the federal Constitution and federal law. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (citations omitted). As the Court has further noted, "[w]hile state courts are fully entitled to entertain disputes that would not qualify as cases or controversies under Article III, it is questionable whether they have the power, by granting or denying third-party standing, to create or destroy federal causes of action." *U.S. Dept. of Labor v. Triplett*, footnote, 494 U.S. 715, 721 (1994) (citation omitted).

Thus, to the extent that this Court has imposed Article III's limitations concerning third-party standing in the context of state court decisions, the scope of such limitations has been explicitly confined to state courts' interpretations of federal law. In the matter *sub judice*, no federal cause of action is implicated, and no West Virginia court has rendered binding interpretations of federal constitutional provisions or other federal law.

The very inapplicability of the federal justiciability doctrines emanating from Article III, recognized repeatedly by this Court (and yet altogether ignored by petitioners), has also been recognized and embraced by state courts beyond West Virginia. *See Weld v. Glaxo Welcome, Inc.*, 746 N.E.2d 522, 529 (Mass. 2001) ("State courts, however, are not burdened by [federal] jurisdictional concerns, and, consequently, may determine, particularly when class actions are involved, that concerns other than standing, in its most technical sense, may take precedence.") (citation omitted); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1081-82 (Ohio 1999) ("[S]tate courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits").

Moreover, while this Court may have jurisdiction to hear and decide the instant petition, the Rules of this Court raise serious questions concerning the advisability of hearing and determining the same. *See* Rule 10(b) and (c), Rules of the Supreme Court. Indeed, to adopt the argument urged by petitioners (i.e. that the due process considerations embodied in the fourteenth amendment to the federal Constitution some-

how compel this Court to impose Article III's federal standing requirements on state court litigants) would require this Court to abandon well-settled (and well grounded) precedent "recognized often" by this Court. *ASARCO, Inc.*, 490 U.S. at 617. *See also Pennell v. San Jose*, 485 U.S. 1 (1988).

In *State ex rel. Erie Fire Ins. v. Madden*, 204 W.Va. 606, 515 S.E.2d 351 (1998) the Supreme Court of Appeals of West Virginia had occasion to review a situation where a representative plaintiff in a class action, having dealt with only one defendant, brought a class action against multiple defendants alleged to have engaged in discrete but similar practices that collectively injured the plaintiff class. The defendants with whom the proposed representative plaintiff had not had prior dealings moved to dismiss the action on the basis that the plaintiff had no direct claim against them. The trial court denied the motion after determining that the plaintiff could act as a class representative for persons who had claims against the other defendants even though plaintiff had no personal claim against them based on its finding of a "juridical link." Upon reviewing the trial court's decision on writ of prohibition, the West Virginia high court found that the factors relied upon by the trial court did not support a finding of a juridical link and remanded the action with instructions for the circuit court to grant the defendants' motion to dismiss.

In ruling upon the petition for prohibition in *Erie v. Madden*, the high court of West Virginia took cognizance of the petitioners' argument that because the representative plaintiff did not have a personal claim against each of the named defendants, she did not present the circuit court with a justiciable case or controversy over which the circuit court had

subject matter jurisdiction under the West Virginia state constitution. In discussing the "standing" issue, the *Erie v. Madden* court harkened back to its earlier decision in *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241 (1981) where it observed that:

> "the question of standing to sue is whether the litigant has alleged such a personal stake in the outcome of the lawsuit so as to present the court with a justiciable controversy warranting judicial resolution of the dispute. In order to have standing to sue, a party must allege an injury in fact, either economic or otherwise, which is the result of the challenged action and show that the interest he seeks to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation, or constitutional guarantee which is the basis for the lawsuit."

The West Virginia high court has also noted that "in West Virginia, the slippery doctrine of standing is not usually employed to avoid a frontal confrontation with an issue of legitimate public concern." *State ex rel. Alsop v. McCartney*, 159 W.Va. 829, 838, 228 S.E.2d 278, 283 (1976). Further, in *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 220 S.E.2d 672 (1975), the West Virginia court recognized that "a simple, easily comprehensible definition of subject matter jurisdiction is almost a contradiction in terms. Complex issues often make the determination of subject matter jurisdiction difficult, as for example, justiciablility, ripeness, mootness, standing, case or controversy, and politic questions." *Id.*

Indeed, due to "the slipperiness of standing issues and the complexity of subject matter jurisdiction jurisprudence" and based on what was termed "the prudence that cautions against deciding constitutional matters when it is unnecessary to do so," the *Erie v. Madden* court expressly declined "the invitation to engage in a constitutional subject matter jurisdictional 'standing' analysis to decide whether and when a representative plaintiff on behalf of a class that has been allegedly injured by multiple defendants may assert claims against defendants who are not alleged to have personally injured the named plaintiff." *Erie v. Madden* at fn. 6. Instead, the West Virginia high court elected to address the issue of whether the named plaintiff had the ability to present the claims of absent class members against defendants with whom she had no personal dealing in the context of *W.V.R.Civ.P.* 23.

Indeed, in reaching this conclusion, the West Virginia high court noted that: "A similar approach was taken by the United States Supreme Court in the recent case of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct.2231, 138 L.Ed.2d 689 (1997)." In *Amchem Products, Inc.*, this Court faced arguments that a class action did not present a justiciable case or controversy. The *Amchem Products, Inc.* court, however, expressly declined to address those issues, and found that Rule 23 issues are "logically antecedent to the existence of any Article III [justiciability] issue, [and therefore] it is appropriate to reach them first." *Amchem Products, Inc.*; *See also Ortiz v. Fibre Board Corp.*, 537 U.S. 815 (1999). Likewise, the state court rulings which found the class procedural device to be appropriate in this action were

reached only after a careful application of the criteria provided for under *W.V.R.Civ.P.* 23.

C. The Class Procedural Device is Appropriate in this Action

The state court properly found that the question of whether the class procedural device should be allowed is primarily governed by *W.V.R.Civ.P.* 23 (Petition App. B at ¶10; *Evans v. Huntington Publishing Co.*, 283 S.E.2d 854, 855 (W.Va.1981)).[1] The Order Certifying Class provides that, under *W.V.R.Civ.P.* 23(a)(1)-(4), a class member may bring an action as a representative party in cases where: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the representative party are typical of

---

[1] The Wisconsin Court of Appeals recently evaluated a class claim for overcharging asserted against medical record providers (including hospital and copy company defendants). *Cruz v. All Saints Healthcare Systems, Inc.*, 242 Wis.2d 432, 624 N.W.2d 344 (Wis. Ct. App. 2001). Although that opinion dealt with a "reasonable charge" statute as opposed to a "reimbursement" statute, the court noted that "given the economic realities of [the] case, class action may be the only effective means to implement the legislature's intent to provide redress for unreasonable charges [under the statute]. These economic factors made this case ideally suited to class action. Here, the aggregation of small claims, when joined as a class, becomes worthwhile to litigate. This economy of scale rationale underlying class actions has long been recognized by courts." *Id.* (citations omitted). Plaintiff's claims on behalf of medical record requestors in the action *sub judice* are similarly well-suited to class treatment, including, of course, reasons of judicial economy.

the claims of the class; and (4) the representative party will fairly and adequately protect the interests of the class (Petition at App. B at ¶11).

The petitioners argue that by allowing the class procedural device to be maintained in this action, they have been deprived of life, liberty, or property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Despite their acknowledgment that "standing" under Article III's "case or controversy" requirement does not control this state court action, the petitioners have nonetheless structured the instant petition around the proposition that the federal standing requirement should be construed to bar the West Virginia courts from assuming jurisdiction over the claims asserted in this action. In addition to the due process/standing argument, the petitioners contend that the West Virginia courts' application of *W.V.R.Civ.P.* 23's typicality requirement was erroneous and, again, invoke the due process clause as a basis for their request for this Court to review the decisions below.

D. Typicality/Class Standing

A class action requires a similarity of claims between the representative plaintiff and the class members. This relationship is assured by the typicality requirement set forth at *W.V.R.Civ.P.* 23(a)(3).

Under *W.V.R.Civ.P.* 23(a)(3), a party may sue or be sued as a representative if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement does not require an "identity" between a representative plaintiff's claims and the

claims of each class member. Instead, "typicality" requires only that the representative's claims be similar to and consistent with those of the other members of the class.

The state courts were certainly cognizant of the representative plaintiff's contention that he was overcharged for medical records in violation of *W.Va. Code*, 16-29-2 by the defendant, Weirton Medical Center, and its agent, the defendant, Recordex, but not the other defendants (Petition App. B at ¶14). In discussing the court's role in this situation the trial court observed that:

> "[i]n cases where several entities have engaged in parallel conduct that affects a class of persons in the same or a similar way, the question of whether a single plaintiff who has been affected by the conduct of one of the defendants can name all of those who engaged in the challenged conduct as defendants (even though such plaintiff had no contact with some of them) requires the court to determine whether plaintiff can demonstrate an interrelationship between the common conduct of multiple defendants and the action which he is pursuing." (Petition App. B at ¶14).

The petitioners argue that the representative plaintiff's claims against Weirton Medical Center and Recordex are not "typical" of the claims which other class members have against other defendant hospitals and copy companies. Thus, they claim class certification should be denied under *LaMar v. H & B Novelty and Loan Co.*, 489 F.2d 461 (9th Cir. 1973), where absence of typicality was found to prevent a plaintiff who had been harmed by one defendant from insti-

tuting a class action naming additional defendants who had not harmed plaintiff individually, but rather had engaged in similar conduct that had harmed others. *LaMar* was based on that court's determination that a plaintiff who has no individual cause of action against certain defendants may not fairly and adequately protect the interests of those who have such causes of action. The state courts in this action, however, were keenly aware of the rule of *LaMar* when considering the certification question below (Petition App. B at ¶14).

Indeed, the respondent's request for class certification in this matter was granted only after the trial court found that class treatment was consistent with the ruling articulated in *LaMar* (Petition App. B at ¶15, 16 and 17). In describing the scope of its holding, the *LaMar* court noted that:

> "Obviously, this position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *LaMar,* 489 F.2d at 465-66.

Hence, under the logic of *LaMar* such actions may be maintained in cases where the representative plaintiff has alleged a conspiracy or concerted action among all defendants and in cases where "all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious." *Id.* at 466. Although these exceptions to the general rule of *LaMar* were first articulated

as *dicta*, subsequent decisions have relied upon them as a guide for analyzing the propriety of class actions involving multiple defendants. Indeed, the West Virginia high court has adopted the approach suggested in *LaMar* for determining the propriety of class certification in cases dealing with multiple defendants in West Virginia. *See Erie v. Madden.*

1. Application of Conspiracy or Concerted Action Exception

When the alleged parallel conduct of multiple defendants is the result of a conspiracy, not only are all members of the conspiracy jointly liable, but such members may also be joined by a plaintiff as named defendants in a class action; and, so long as the other requirements of Rule 23 are met, such plaintiff may represent the class of all persons injured by the conspiracy, even though he can demonstrate no individual dealings with some of the defendants.

To the extent that the concerted action exception relates to an alleged conspiracy it is, in reality, not a true exception to the rule of *LaMar*, as an allegation of conspiracy states a direct claim against all conspirators irrespective of whether any particular conspirator had dealings with the representative plaintiff.[2] In any event, the concerted action exception was properly applied to the Rule 23(a)(3) typicality issue in certifying a plaintiff class in this case (Petition App. B at ¶15 - ¶16).

---

2 Under a conspiracy theory, all conspirators may be held jointly and severally liable to the plaintiff regardless of whether they had any direct dealings with him.

In class actions involving buyers and sellers where plaintiffs allege a price-fixing conspiracy, class representatives who had not dealt with all of the defendants are routinely found to satisfy the typicality requirement for class certification on the basis that the representatives' claims are based on the same legal theories and factual allegations as those of the putative class members. *In re: Auction Houses Antitrust Litigation*, 193 F.R.D. 162 (D.C. N.Y. 2000); *In re: Industrial Diamonds Antitrust Litig.*, 167 FRD 374 (S.D.N.Y. 1996).

While it should be observed that, for purposes of determining class certification issues, the allegations of the amended complaint are taken as true and the merits of the claims are not examined, *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156 (1974), evidence has been developed in support of the concerted conduct allegation in this case. In a separate action filed in Monongalia County, West Virginia, dealing with the production of medical records, petitioner, West Virginia University Hospital, took the position that for billing purposes there exists no distinction between itemized billing statements and medical records and that it is permissible for it to charge patients and authorized representatives 75¢ per page and a $10 search fee for itemized billing statements under *W.Va. Code,* 16-29-2. The financial services director for West Virginia University Hospital made it clear that the hospitals throughout this state have agreed to charge this maximum allowable rate with respect to itemized billing statements. Further, in that same case, the director of health information management for petitioner, West Virginia University Hospital, acknowledged that it was her understanding that: (1) the hospital or the copy company with whom it has

contracted could charge a maximum of 75¢ per page and a $10 search fee; (2) that such charges had been talked about at seminars she had attended; and (3) that charging the statutory maximum was the "general consensus in this state."

While the petitioners imply that the state courts relied upon the juridical link doctrine as the sole basis for the determination that Mr. Guida may proceed in the action below as the class representative, the certification order clearly states that "an examination of Plaintiff's Amended Complaint reveals allegations that the parallel conduct of the multiple defendants is the result of a conspiracy." Thus, the case was "found to fall within the concerted action exception to the rule of *LaMar*" (Petition App. B at ¶16). The state court's finding in this regard is well supported by the pleadings and the record adduced below.

2. Application of the Juridical Link Doctrine

Apart from the allegations of conspiracy and concerted action, the class in this action was also certified on the basis of the defendants' juridical relationship. The West Virginia court properly found that the defendants in this action are juridically related in a manner which suggests that a single resolution of this dispute would result in a far more expedient and economical use of judicial resources than the piecemeal litigation of each class member's individual claim, and that, accordingly, the action could be maintained as a class.

In cases where the representative plaintiff is able to show some specific connective link or relationship between the defendants' challenged conduct and the asserted claims, such plaintiff has established a juridical link, and, accordingly,

may proceed in a representative capacity under *W.V.R.Civ.P.* 23 against defendants with whom he has had no personal contact.

In an action involving a proposed class representative who has sued multiple defendants and who has had dealings with some of them (and therefore possesses individual threshold standing against such defendants), a West Virginia court is not required to apply an individual standing analysis with respect to the remaining defendants so long as the representative plaintiff can meet the *W.V.R.Civ.P.* 23 test of typicality by demonstrating that his claim is similar to and consistent with those of the class. In reaching the decision to permit this action to proceed as a class, the state courts were guided by the juridical links doctrine as adopted in West Virginia by the high court in *Erie v. Madden*.

However, unlike the insurance companies in *Erie v. Madden*, the state court found that in this matter the defendant hospitals fell within the express purview of the West Virginia statutes which form the basis of this action as they are all health care providers licensed, certified, or registered under the laws of West Virginia or agents of licensed, certified, or registered health care providers who have entered into contracts for the purpose of furnishing medical records to patients or their authorized representatives permitted to request medical records under *W.Va. Code, 16-29-1* (*See* Order Certifying Class at ¶17). The state court observed that:

> "unlike the challenged conduct of the insurance companies in *Erie*, the challenged conduct of the defendants in the action *sub judice* arises directly out of their status as licensed, certified, or regis-

> tered health care providers in West Virginia or their agency relationship with licensed, certified, or registered health care providers in West Virginia and their unique duty to furnish medical records in accordance with the terms of the statutes which are the subject of this action." (*See* Order Certifying Class at ¶17).

The state court further found that the:

> "statutory scheme pursuant to which this action is brought gives rise to a cohesiveness, connective link, or interrelationship between the defendants and the claims asserted in the Amended Complaint such as to support a finding that the defendants are juridically related in a manner that suggests a single resolution to this dispute is far preferable to a multiplicity of similar actions." (*See* Order Certifying Class at ¶17).

It is also noteworthy that - because the propriety of each class member's individual infant settlement was required to be determined on the basis of the specific facts and circumstances surrounding such settlement - the representative plaintiff in *Erie v. Madden* was not able to make a clear showing that she could meet the typicality requirement under *W.V.R.Civ.P.* 23(a)(3). This difficulty is not present in the matter at bar as the representative plaintiff's claim is virtually identical to the claims of all other class members.

Because the juridical link doctrine has developed as part of the typicality analysis under *W.V.R.Civ.P.* 23(a)(3), in a case where the representative plaintiff's claim against the

defendants with whom he has had dealings is undeniably typical of the claims which class members have against the defendants with whom the representative plaintiff has not had direct dealings, there is less reason for concern that the representative plaintiff may not "fairly and adequately protect the interests" of those who have direct claims.

Hence, because the representative plaintiff's claims are unquestionably "similar to and consistent with those of the other members of the class," and because the proposed representative plaintiff has demonstrated a specific connective link or relationship between the defendants' challenged conduct and the claims which he asserts in this case, it is clear that the state court's determination that the defendants are juridically related in a manner such that a single resolution of this dispute would be preferable to a multiplicity of similar actions does not impinge upon such defendant's right to due process and is in accord with well accepted principles of the law of class actions.

CONCLUSION

For all of the foregoing reasons, the respondent respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

Wray V. Voegelin, Esq.
Counsel of Record
Donald J. Tennant, Jr., Esq.
CASSIDY, MYERS, COGAN,
VOEGELIN & TENNANT, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
(304) 232-8100

Paul R.Cranston, Esq.
CRANSTON & EDWARDS, PLLC
Dorsey Avenue Professional Bldg
1200 Dorsey Avenue, Suite II
Morgantown, WV 26505
(304) 296-3500

Jacques R. Williams, Esq.
HAMSTEAD, HAMSTEAD
& WILLIAMS
231 Walnut Street
Morgantown, WV 26505
(304) 296-3636

David J. Sims, Esq.
Robert G. McCoid, Esq.
SIMS & MCCOID
1201 Main Street
Wheeling, West Virginia 26003
(304) 242-2000

Attorneys for Respondent,
David Guida